(2)

No. 89-78

Supreme Court, U.
FILED
SEP 30
JOSEPH F. SPANIOL
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

AUDELIO ARZOLA-AMAYA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

QUESTION PRESENTED

Whether petitioners' convictions should be reversed because the trial judge did not question the jurors about whether they were exposed to mid-trial publicity.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Greer v. *Miller*, 483 U.S. 756 (1987)	8
Margoles v. *United States*, 407 F.2d 727 (7th Cir.), cert. denied, 396 U.S. 833 (1969)	6
Opper v. *United States*, 348 U.S. 84 (1954)	8
Richardson v. *Marsh*, 481 U.S. 200 (1987)	8
Rizzo v. *United States*, 304 F.2d 810 (8th Cir.), cert. denied, 371 U.S. 890 (1962)	6
United States v. *Attell*, 655 F.2d 703 (5th Cir. 1981)	5
United States v. *Balistrieri* 779 F.2d 1191 (7th Cir. 1985)	7
United States v. *Carrodeguas*, 747 F.2d 1390 (11th Cir. 1984), cert. denied, 474 U.S. 816 1985)	7, 8
United States v. *Gaggi*, 811 F.2d 47 (2d Cir.), cert. denied, 482 U.S. 929 (1987)	5
United States v. *Gray*, 788 F.2d 1031 (4th Cir. 1986)	5
United States v. *Greschner*, 802 F.2d 373 (10th Cir. 1986), cert. denied, 480 U.S. 908 (1987)	8
United States v. *Harrelson*, 754 F.2d 1153 (5th Cir. 1985)	7
United States v. *Herring*, 568 F.2d 1099 (5th Cir. 1978)	5, 7
United States v. *Jones*, 542 F.2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976)	7
United States v. *Manzella*, 782 F.2d 533 (5th Cir.), cert. denied, 476 U.S. 1123 (1986)	5, 6

Cases—Continued: Page

United States v. *Metzger*, 778 F.2d 1195 (6th Cir. 1985), cert. denied, 477 U.S. 906 (1986) 6, 8
United States v. *Perrotta*, 553 F.2d 247 (1st Cir. 1977) 7
United States v. *Porcaro*, 648 F.2d 753 (1st Cir. 1981) 5
United States v. *Trapnell*, 638 F.2d 1016 (7th Cir. 1980) 7

Statutes:

21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
21 U.S.C. 848(b) 2
26 U.S.C. 7206(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-78

AUDELIO ARZOLA-AMAYA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 867 F.2d 1504.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1989. A petition for rehearing was denied on May 15, 1989. Pet. App. 31-32. The petition for a writ of certiorari was filed on July 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner Arzola-Amaya was convicted of conducting a continuing criminal enterprise, 21 U.S.C. 848(b), possessing cocaine with intent to distribute it, 21 U.S.C. 841(a)(1), possessing marijuana with intent to distribute it, 21 U.S.C. 841(a)(1), conspiring to distribute marijuana, 21 U.S.C. 846, and signing a false income tax return, 26 U.S.C. 7206(1). The remaining petitioners were convicted of a variety of narcotics crimes.[1] Petitioner Arzola-Amaya was sentenced to life imprisonment and a fine of $1,000,000; petitioner Rosas-Arzola was sentenced to seven years' imprisonment; petitioner Maynard was sentenced to ten years' imprisonment; and petitioner Salazar was sentenced to 15 years' imprisonment. Pet. App. 2-3.

1. From 1980 to 1987, petitioners were members of a drug organization that sold cocaine and marijuana. Petitioner Arzola-Amaya headed the organization; his source of cocaine was a Colombian drug dealer. During that period, the operation grew from a one-man enterprise into a very large, international organization. At the time of his arrest, Arzola-Amaya was distributing more than 500 kilograms of cocaine a month. Pet. App. 3-4, 6.

2. During voir dire, the trial court asked the panel whether anyone had heard anything about the case through the news media. After ascertaining that no

---

[1] In particular, petitioners Rosas-Arzola and Maynard were convicted of conspiracy to possess cocaine. Petitioner Salazar was convicted of possessing cocaine with intent to distribute it, and possessing marijuana with intent to distribute it. Pet. App. 2-3.

one on the panel had heard anything, the court cautioned the panel (Pet. App. 21):

> If during the course of the questioning, it suddenly dawns on you that you have heard about it, that you saw something on television or read a newspaper story or anything like that; well please go ahead and raise your hand and bring it up then.

The trial court later explicitly instructed the jury to avoid all publicity concerning the case (*ibid.*):

> There may be during the trial . . . publicity about the case in the news media. You are not permitted to read about it in the newspaper and are not permitted to watch or listen to anything that is broadcast about the trial on television or radio. So please guard your conduct in that regard and don't slip up and find yourself exposed to any kind of news media publicity about the case at a time that you are serving as a juror.

During the two-week trial, many articles about the trial appeared in the El Paso, Texas, and Juarez, Mexico, newspapers. Headlines concerning the case appeared in newspapers located in vending machines throughout the downtown area of El Paso and surrounding the courthouse. For the most part, the articles followed the trial testimony. Pet. App. 20, 22. A few of the articles made brief reference to a prior drug conviction of petitioner Arzola-Amaya and a prior racketeering conviction of petitioner Maynard —facts that had not been brought out at trial. Pet. 5, 15-16. Petitioners requested the trial court to poll the jury regarding mid-trial publicity, but the court denied their requests. Pet. App. 19. The court stated that "although there was extensive news media cov-

erage of the trial, most of it took the form of reports of the actual trial proceedings, and these matters had occurred in the presence of the jury in the first place." Pet. App. 22.

The court instructed the jury throughout the trial not to read or listen to any media accounts of the trial, and to take precautions to avoid exposure to any media coverage of the trial. The court repeatedly emphasized the importance of following those instructions. The court explained that it was improper for the jury to consider any information other than that presented in court, and that the jury's verdict had to be based solely on the evidence the court had admitted. See Tr. 10, 48-50, 190-191, 462-463, 708-709, 1022, 1255-1256, 1510, 1774, 2061, 2333, 2614, 2742, 3175. And at a break during deliberations, the court again explicitly instructed the jury: "[D]o not read anything that might be printed in the newspaper or listen to anything or watch anything that might be broadcast or telecast on radio or television concerning this case." Tr. 3353-3354. The jury found petitioners guilty on the charges described above.

3. The court of appeals affirmed. Pet. App. 1-30. The court rejected petitioners' claim that the trial court committed reversible error by denying their requests to question the jury regarding mid-trial publicity. *Id.* at 19-22. The court noted that the conduct of the trial had been "strictly and correctly controlled," and that for the most part the newspaper articles in question followed the trial testimony. *Id.* at 22. The court of appeals found that the "very careful and very specific" cautionary instructions concerning media coverage "were adequate safeguards to ensure that [petitioners] received a fair trial free from prejudice." *Ibid.* The court of ap-

peals also pointed to the jury's acquittal of petitioners on many counts as evidence that petitioners had not been prejudiced by the media coverage. *Ibid.*

ARGUMENT

Petitioners renew their claim (Pet. 5-20) that the district court erred in not asking the jurors whether they disregarded the court's many instructions and read newspaper reports about the trial. That fact-specific contention is without merit.

The Fifth Circuit, acting under its authority to supervise district courts in that circuit, has held that a two-step inquiry is required when publicity about a trial is brought to the district court's attention. First, the district court must determine whether the nature of the material "raises serious questions of possible prejudice." *United States* v. *Herring*, 568 F.2d 1099, 1104 (5th Cir. 1978). That inquiry has two components: The court "must first look at the nature of the news material in question to determine whether it is innately prejudicial"; the court must then "ascertain the likelihood that the publicity has in fact reached the jury." *United States* v. *Manzella*, 782 F.2d 533, 542 (5th Cir.), cert. denied, 476 U.S. 1123 (1986). If the district court finds those two conditions met, then the court must conduct an inquiry to determine whether any jurors have been exposed to the publicity and improperly affected by it. *United States* v. *Attell*, 655 F.2d 703, 705-706 & n.3 (5th Cir. 1981). Such an approach also has been adopted by the First, Second, and Fourth Circuits. See *United States* v. *Gaggi*, 811 F.2d 47, 51 (2d Cir.), cert. denied, 482 U.S. 929 (1982); *United States* v. *Gray*, 788 F.2d 1031, 1032 (4th Cir. 1986); *United States* v. *Porcaro*, 648 F.2d 753, 757 (1st Cir. 1981).

The Sixth Circuit has taken a slightly different—although ultimately consistent—approach to the question of mid-trial publicity. In *United States* v. *Metzger*, 778 F.2d 1195 (1985), cert. denied, 477 U.S. 906 (1986), that court stated that " '[w]here a jury has been clearly admonished not to read newspaper accounts of the trial in which they are serving as jurors, it is not to be presumed that they violated that admonition.' " *Id.* at 1209 (quoting *Rizzo* v. *United States*, 304 F.2d 810, 815 (8th Cir.), cert. denied, 371 U.S. 890 (1962)). The Sixth Circuit accordingly ruled in *Metzger* that the defendant must show a probable violation of the court's instruction not to read newspaper accounts before the court has the duty to question the jurors. 778 F.2d at 1209.

The Sixth Circuit approach is consistent with the law of the other circuits. One component of the inquiry required by the Fifth Circuit is to determine "the likelihood that the publicity has in fact reached the jury." *United States* v. *Manzella*, 782 F.2d at 542. That is the same inquiry directed by the Sixth Circuit in *Metzger*. In every case, the trial court must look to all the circumstances—*e.g.*, "[t]he prominence of the media coverage and the nature and number of warnings against viewing [or reading] the coverage," *United States* v. *Manzella*, 782 F.2d at 542—to decide whether there is a serious risk that the jury was exposed to prejudicial publicity. That is what the court did in this case, and it is what each of the other circuits requires. Accordingly, this case does not raise any conflict in the circuits.[2]

---

[2] The Seventh Circuit in *Margoles* v. *United States*, 407 F.2d 727, 735, cert. denied, 396 U.S. 833 (1969), appeared to adopt a per se rule requiring the trial court to grant a

At bottom, petitioners' disagreement (Pet. 15-19) is with the district court's finding that the newspaper articles at issue in this case did not raise a serious possibility of prejudice.[3] The resolution of that fact-specific question, however, is committed to the discretion of the trial court, with deferential appellate review. See *United States* v. *Carrodeguas*, 747 F.2d 1390, 1395 (11th Cir. 1984), cert. denied, 474 U.S. 816 (1985); *United States* v. *Perrotta*, 553 F.2d 247, 250 (1st Cir. 1977); *United States* v. *Jones*, 542 F.2d 186, 194-195 (4th Cir.), cert. denied, 426 U.S. 922 (1976).

---

defendant's request to ask the jurors whether they were exposed to prejudicial mid-trial publicity. Later cases in that circuit, however, indicate that there is not a per se rule requiring reversal if an inquiry is not made following media reports concerning the trial. See *United States* v. *Balistrieri*, 779 F.2d 1191, 1213-1214 (7th Cir. 1985) ("failure to follow the procedure [set forth in *Margoles*] is not automatically reversible error. * * * The ultimate inquiry is whether there is substantial likelihood that the defendants were denied a fair trial."); *United States* v. *Trapnell*, 638 F.2d 1016, 1022 (7th Cir. 1980) (such an inquiry is required only if the prejudical publicity "may reasonably be believed to have come to the attention of the jurors").

[3] Petitioners mistakenly argue (Pet. 10-11) that the decision below conflicts with prior Fifth Circuit precedent. The Fifth Circuit has consistently held that "the nature and number of warnings against" reading or viewing media coverage are relevant to the question whether there is a serious risk that the jury was exposed to prejudicial publicity. Compare *United States* v. *Harrelson*, 754 F.2d 1153 (5th Cir. 1985) (judge's admonitions were adequate to shield jury from publicity), with *United States* v. *Herring*, *supra* (judge's warnings were inadequate). In this case, the Fifth Circuit reasonably held that the trial court's many instructions were sufficient to minimize the risk that the jury would read prejudicial newspaper articles.

The trial court in this case did not commit reversible error in finding that there was not a serious risk of possible prejudice. The court found that, although there were many newspaper reports about the trial, "most of [them] took the form of reports of the actual proceedings, and these matters had occurred in the presence of the jury." Pet. App. 22. Moreover, the court gave repeated, strict instructions to the jury to avoid all publicity about the case. And the law generally presumes that jurors can and will follow the court's instructions. See *Greer* v. *Miller*, 483 U.S. 756, 766 n.8 (1987); *Richardson* v. *Marsh*, 481 U.S. 200, 206-207 (1987); *Opper* v. *United States*, 348 U.S. 84, 95 (1954).

Petitioners note (Pet. 15-16) that a few of the articles referred to the prior convictions of petitioners Arzola-Amaya and Maynard. Those references, however, were embedded in articles that otherwise merely repeated the trial proceedings.[4] There is no reason to believe that any juror disobeyed the court's instructions, read those articles, and learned of the prior convictions. See *United States* v. *Greschner*, 802 F.2d 373, 381 (10th Cir. 1986) (court cannot presume that jurors disobeyed instructions not to read news accounts), cert. denied, 480 U.S. 908 (1987); *United States* v. *Metzger*, 778 F.2d at 1209; *United States* v. *Carrodeguas*, 747 F.2d at 1395. Accordingly, the trial court did not commit reversible error by not

---

[4] The newspaper reports were even less prejudicial to the other petitioners. Petitioner Salazar contends (Pet. 16) that he was identified as a "Colombian national." And petitioner Santiago-Rosas complains (Pet. 17) about stories concerning his attorney's possible involvement in the conspiracy, a matter that had already been brought out at trial.

highlighting those articles even more by asking the jurors whether they had read them.

Finally, the jury's verdict tends to confirm the trial court's conclusion that petitioners were not prejudiced by the mid-trial publicity. The jury acquitted all the petitioners except Arzola-Amaya on at least one of the counts of the indictment. Thus, as the court of appeals observed, the verdict "indicates a fair minded consideration of the issues and reinforces [the] belief and conclusion that the media coverage did not lead to the deprivation of [petitioners'] right to an impartial trial." Pet. App. 22.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

DEBORAH WATSON
Attorney

SEPTEMBER 1989

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 241699 531